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No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN L. TAUGHER,
Defendant in Error.

Filed this .....*day of November, 1916.*

FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

PERNAU PUBLISHING COMPANY

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Statement of Facts.

This was an action brought to recover the reasonable value of services performed prior to December 10th, 1913, in England, Colorado, New York and elsewhere by John L. Taugher, plaintiff in the Court below, for the Moore Filter Company, defendant in the Court below, and for plaintiff's expenses incurred in the performance of such services, and also for the value of services rendered by plaintiff while he was president of the Moore Filter Company, and for money paid out by him for the benefit of said defendant company, at its request.

The complaint states three separate counts or causes of action, the first claims for the reasonable value of the services performed by the plaintiff *prior* to the time he became president of the company and his expenses incurred in the performance of such services. The second count claims for the value of services rendered while president of the Moore Filter Company and the third count for money paid out by the plaintiff at the request of the defendant company and for its benefit.

The services sued for in the first count may be briefly described as

(1) Services performed by plaintiff in England and his expenses in connection with his journey to England and return.

(2) Services performed by plaintiff in New York in connection with the settlement made there by him with the Buffalo Mines Company, Limited, and expenses connected therewith.

(3) Services in connection with trip to Washington and expenses.

(4) Services in connection with the settlement made by plaintiff with the Golden Cycle Mining Company; these last mentioned services may be divided into three parts;

a. Services in connection with the said settlement whereby the plaintiff procured for the Moore Filter Company from the Golden Cycle Mining Company fifty thousand dollars in cash

(for this item of service plaintiff received in August, 1913, the sum of ten thousand dollars under the terms of a special contract relating to this special item of service (see pages 4 and 5 of Transcript, also page 8 thereof), and payment of which amount was authorized by a resolution of the board of directors of the Moore Filter Company long before the commencement of this action, to wit: in August, 1913 (Transcript pp. 24 and 25).

b. Services in connection with the procuring of a confession of judgment by the Golden Cycle Mining Company entered in the District Court of the United States for the Southern District of West Virginia, wherein that company confessed to the validity of the patent of the Moore Filter Company and acknowledged the infringement by it of that patent and acknowledged that the Golden Cycle Mining Company had profited by such unlawful use in the sum of fifty thousand dollars ($50,000.00).

c. Services in connection with the procuring of other valuable considerations which the Golden Cycle Mining Company undertook to turn over to the Moore Filter Company.

This action was commenced in the District Court of the United States for the Northern District of California on January 22nd, 1915, and personal service on the defendant was effected in the Northern District of California by service upon the

agent in charge of defendant's business in California in said District.

Motion to quash that service of process was made by the defendant in the Court below on various grounds, among them that the defendant was not doing business in California and that the United States District Court for the Northern District of California did not have jurisdiction of the defendant nor of the subject matter of the action. That motion was denied and in an opinion which is made a part of the record herein, Judge Van Fleet ruled that the Moore Filter Company was doing business in California at the time of service of process herein and that such service was properly made upon the defendant by service upon defendant's voluntarily appointed agent in charge of its business in California (Transcript pp. 29 and 30). No exception was taken to that ruling.

The defendant thereafter filed its answer to the merits and in addition to such answer set up a counter-claim praying that the plaintiff take nothing by his action and that the defendant be given judgment against the plaintiff in the sum of seven thousand five hundred dollars ($7,500.00). The action came on to be tried before Judge Van Fleet, sitting with a jury, on the 13th day of January, 1916, and evidence was introduced by both plaintiff and defendant, the trial proceeding until January the 20th, 1916, when the case was given to the jury under the instructions of the Court.

No objection of any kind was made to the charge of the trial judge to the jury and no exception of any kind was taken to it, and the jury returned a verdict on the said day in favor of the plaintiff for the sum of eighteen thousand three hundred and fifty-eight dollars ($18,358.00) and on said day judgment for said amount was duly entered in favor of the plaintiff and against the defendant.

Motion for new trial was thereafter made and denied.

The defendant then sued out a writ of error, filed its assignments of error and subsequent thereto settled its bill of exceptions.

The bill of exceptions so settled shows that but six (6) exceptions were taken to the ruling of the trial Court.

The assignments of error number fourteen (14), but only six (6) of those were based upon an exception, and but three (3) exceptions are before this Court for consideration and two (2) of these involve the same point, i. e. jurisdiction. Plaintiff in error's brief mentions assignment of error No. 7, but that was not based upon an exception.

Concerning the plaintiff in error's assignments of error or exceptions relating to the jurisdictional question argued in its brief, plaintiff in error on page 3 thereof states as follows:

> "As both these specifications of error, viz: one and eight, deal with the same question, i. e. jurisdiction, and upon the same state of facts, they may be considered together."

Since there are no *specifications* of error, it is impossible for the writer to tell exactly what plaintiff in error means by specifications of error one and eight, but it seems to be exception No. 1 and assignment of error No. 9 that deal with the same question, i. e. jurisdiction, and in that belief the further argument herein will proceed.

The manner in which the question of jurisdiction which is attempted to be raised by the first exception came about, was as follows:

After the opening statement of counsel for the plaintiff in the Court below, Judge Van Fleet himself suggested the question as to whether or not he had jurisdiction of the defendant or of the subject matter of the action, since it grew out of transactions which did not have their origin in this state and no part of which was performed in this state, and the service of process being in its nature a *substituted* one (which is apparently a mere *lapsus linguae* on the part of Judge Van Fleet, as he had already found in the action that there was personal service upon the defendant, since he had found that which amounts to the same thing, that the defendant was carrying on business in California and that service of process had been made upon the duly and voluntarily ap-

pointed agent of the defendant company in charge of its business in California. See Judge Van Fleet's opinion, Transcript pp. 29 and 30).

The matter was then argued at considerable length and it was then that Judge Van Fleet's own opinion in the case of Frye v. Denver & R. G. Co., 226 Fed. 893, was again thoroughly considered by him as well as the very important fact that defendant in the Court below had not only answered to the merits but in addition had filed a counter-claim asking affirmative relief in this action. Judge Van Fleet concluded that the District Court for the Northern District of California had acquired jurisdiction and he merely directed the case to proceed (Transcript pp. 31 and 32).

The defendant's counsel merely noted an objection to such direction to proceed with the case.

This matter was not raised at the time by objection of counsel for the defendant in the Court below, but on the contrary the matter was more in the nature of an argument between the Court below and the plaintiff there as to *whether a transitory cause of action could be tried in a state other than that in which the contract was made or the services performed.*

As plaintiff below pointed out to the trial Court and now again here submits, the question so suggested by Judge Van Fleet was conclusively determined by this Court in Denver & R. G. Co. v. Roller, 100 Fed. 738. Judge Van Fleet's holding

in Frye v. Denver & R. G. Co. seems to be to the contrary of the holding of this Court in Denver & R. G. Co. v. Roller. It was suggested that the Supreme Court in Old Wayne Mut. L. Asso. v. McDonough, 204 U. S. 222, and Simon v. Southern Ry. Co., 236 U. S. 115, had declared a doctrine contrary to the holding of this Court in Denver & R. G. Co. v. Roller. These Supreme Court cases were again carefully considered in the Court below, the plaintiff contending that the Supreme Court in each of these cases had expressly excluded from its opinion proceedings such as those dealt with by this Court in Denver & R. G. Co. v. Roller, and after such argument was concluded Judge Van Fleet ordered the trial to proceed (Reporter's notes, pp. 14 and 15).

In the quotation in plaintiff in error's brief concerning this matter, pages 2 and 3 (which quotation, by the way, is not taken from the Transcript of the case, but is taken from the Reporter's notes which are not made part of the Transcript), the plaintiff in error broke his quotation to omit, among others, the following statement of Judge Van Fleet in this connection:

> "The COURT. But if he (plaintiff) has a right to maintain it here, he need not be driven to the state of Maine. Of course, none of us are infallible; you will find as you go through life that you are bound to make mistakes; I am just as liable to make a mistake as anybody else. I have not such pride of opinion as would induce me to deny a man a right which

would grow simply out of my desire to sustain my own view. You may go on with your evidence."

It is submitted that such circumstances and proceedings did not raise in any way the question of jurisdiction of the trial court.

Moreover, *the question of jurisdiction had been settled in this action months before the trial commenced.* A motion was made to quash the service of process herein upon the defendant corporation on the ground that the Court had no jurisdiction of the defendant nor of the cause of action (see plaintiff in error's assignment No. 1).

That motion was argued at great length and Judge Van Fleet held as follows:

> "Under the terms of the contract between the witness Edwin Letts Oliver and the defendant (Moore Filter Company) the former was unquestionably constituted the agent of the defendant in this state and the evidence of the witness satisfies me that such relationship still subsisted at the time of the service of process herein * * * and the evidence shows that the relations of the parties to that contract were not terminated until subsequent to service of process in question. * * *
>
> "That Oliver was authorized under the terms of the contract to manage the affairs of the defendant so far as it was committed to him in this state, is, I think, well within the terms of the contract and that his business was such as to make service upon him effectual I think fairly appears.
>
> "The motion to quash will be denied."

The defendant took no exception to that ruling.

CONCERNING THE EFFECT OF DEFENDANT'S FAILURE TO TAKE AN EXCEPTION TO JUDGE VAN FLEET'S RULING THAT SERVICE OF PROCESS HEREIN ON THE DEFENDANT WAS GOOD AND THAT THE COURT HAD JURISDICTION OF THE DEFENDANT AND OF THE CAUSE OF ACTION.

When Judge Van Fleet made his order denying the motion to quash service of process and ruled that the United States District Court for the Northern District of California had jurisdiction of the defendant and of the cause of action, if the defendant wanted to obtain a review of that ruling in this Court it was necessary for it to take an exception to such ruling in accordance with the rules of the Court. When defendant in the court below failed to take an exception to the ruling, it is submitted that defendant must be held, by failing to take an exception to that ruling, to have acquiesced in it.

There is no question but that the United States District Court had general jurisdiction of the action, it being an action between citizens of different states and involving more than three thousand dollars.

Judicial Code, Section 51 provides:

> "* * * Except as provided in the six succeeding sections no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only* in

> the district of the residence of either the plaintiff or the defendant."

This action was brought in the residence of the plaintiff and therefore service could be legally made upon the defendant in this district, if defendant could be found and legally served in this district. *It was one of the two districts* in which the action could be brought.

If the defendant were not properly served in this district or if there was any informality or irregularity in such service, defendant could have waived the informality or irregularity in the service and have answered in this district, without question.

In In re Moore, 209 U. S. 490, the Court quoted from Interior Constr. etc. Co. v. Gibney, 160 U. S. 217, 219, as follows:

> "Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance without taking the objection."

The Court also quoted from Ex parte Wisner, 203 U. S. 449, as follows:

> "As the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect."

Proceeding further the opinion said:

> "So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court and if any objection arises to the particular court which does not run to the Circuit Courts as a class, that objection may be waived by the party entitled to make it."

The right of the Moore Filter Company to object to the jurisdiction of this Court was a right that could be waived by it. When defendant below failed to take an exception to Judge Van Fleet's ruling that it had been legally and properly served with process in the action in California and that the District Court of the United States for the Northern District of California had jurisdiction of the said defendant and of the cause of action, it waived any further right to object to that ruling and must be held to have acquiesced in it.

In Rodriguez v. United States, 198 U. S. 156-165, the Court said:

> "Whether this position be well taken or not we do not stop to consider; for, assuming that

> the motion in arrest of judgment was made in time, and assuming even that the court, as matter of law, erred in its interpretation of the statute, still the accused cannot avail themselves here of that error; for the record does not show any exception taken to the overruling of the motion in arrest of judgment. *By not excepting to the ruling of the court the accused must be held to have acquiesced in it, and to have waived the objection made to the grand jury.* We perceive no reason why they could not have legally waived an objection based upon the grounds stated in the motion."

This Court has held practically the same thing on several occasions. One of the recent holdings is in Dunsmuir v. Scott (C. C. A. 9th Cir.), 217 Fed. 200-202, where this Court said:

> "We are limited to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

See also

> Mexico International Land Co. v. Larkin (C. C. A. 8th Cir.), 195 Fed. 495.

Therefore, it is submitted:

That in an action between a citizen of California and a citizen of Maine, involving more than three thousand dollars ($3,000.00) brought in the District Court of the United States in and for the Northern District of California, that being the district of the residence of the plaintiff (Judicial Code, Section 53), and personal service made upon defendant by service upon defendant's voluntarily appointed agent in charge of the defendant's business in the

district of plaintiff's residence in California and motion to quash the service of such process having been made, and the judge of said District Court, after hearing both parties on such motion, having duly *found* that the defendant was doing business in California and that the corporation had been personally served in California (that is, service upon its voluntarily appointed agent in charge of its business in California) and as a necessary consequence that said Court had jurisdiction of said defendant and of the cause of action, *and no exception taken to that ruling,* the question of the jurisdiction of the Court in such action was finally settled and it is not open for review here.

The above, it is submitted, would in itself completely dispose of any question of want of jurisdiction of the Court below.

But in addition to that and to make the submission of the defendant to the jurisdiction even more certain (if such be possible), the defendant not only answered to the merits but set up a counter-claim asking that the plaintiff in the action take nothing by his complaint, but that the defendant be given judgment for seven thousand five hundred dollars ($7,500.00).

The Supreme Court in two recent cases has stated unequivocally that when the defendant sets up a counter-claim he himself invokes the jurisdiction of the Court in the same action and by invoking, submits to it.

In Merchants Heat & Light Co. v. Clow, 204 U. S. 286-289, the Court said:

> "By setting up its counter-claim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it."
>
> * * * * * *
>
> "This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences."

And in Texas & Pacific Ry. Co. v. Eastin, 214 U. S. 153, 159, the Court declared:

> "The single question in this court in that case (Merchants Heat & Light Co. v. Clow, supra) was the jurisdiction of the Circuit Court, from which the case came. The Merchants Heat & Light Company, an Indiana corporation, contended that no jurisdiction had been obtained over it by the service which was made upon one Schodd, who, it was asserted by the plaintiff in the action, was an agent of the company. A motion to quash the return of service was made and overruled, and thereupon the company, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract sued upon, and overcharges in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.
>
> "Whether the company was doing business in the State of Illinois within the meaning of the statute of that state under which service was made, this court did not decide, but it did decide that the company, 'by setting up its counter-claim became a plaintiff in its turn, invoking the jurisdiction of the court in the same

> action, and, by invoking, submitted to it.' And this, notwithstanding the counter-claim arose, as it was said, 'out of the same transaction that the plaintiff sued upon and so to have been in recoupment rather than in set-off proper'."

The plaintiff in error devotes several pages of its brief in an attempt to maintain that the Supreme Court in Merchants Heat & Light Co. v. Clow, *supra,* was dealing with the statutes of Illinois, and plaintiff in error apparently contends that the rule of law declared in that case should be confined to actions coming from the State of Illinois, but the Supreme Court did not so confine the rule, but on the contrary stated is as a general rule of law.

In Texas & Pacific Ry. Co. v. Eastin, supra, the Supreme Court was dealing with a case coming from Texas and reaffirmed the rule declared in Merchants Heat & Light Co. v. Clow, making no reference whatever to the statutes of Texas or of Illinois on the matter of counter-claim.

The argument in the brief of plaintiff in error on the point does not seem to merit any further comment other than to submit that the rules announced by the Supreme Court in Merchants Heat & Light Co. v. Clow and Texas & Pac. Ry. Co. v. Eastin are general rules of law, applicable to cases generally.

Moreover, a glance at the counter-claim set up would show that the defendant was under no necessity of setting that counter-claim up in this action, for a separate suit in equity could have been maintained on it if there was any merit in it whatsoever.

but the trial of this action demonstrated that there was no merit whatever in the counter-claim and that the allegations therein contained were as a consequence false in fact and untrue.

The plaintiff in his complaint set out his services and asks for the reasonable value thereof and his expenses incurred in connection therewith and for the money paid out by plaintiff for the use and benefit of the defendant, claiming therefor the sum of thirty thousand eight hundred and fifty-eight dollars ($30,858.00) less the sum of twelve thousand five hundred dollars ($12,500) which he states he had received on account thereof prior to the bringing of such action and he asks for judgment for the balance owing to him, to wit; the sum of eighteen thousand three hundred and fifty-eight dollars ($18,358).

The counter-claim alleged that the whole services performed by plaintiff were worth only five thousand dollars ($5,000) and asked for a return of seven thousand five hundred dollars ($7,500) part of the twelve thousand five hundred dollars ($12,500) credited by the plaintiff in his complaint. And this absurd counter-claim was advanced notwithstanding the fact that this twelve thousand five hundred dollars ($12,500) has been received by said John L. Taugher nearly a year and a half before the commencement of this action. He first received two thousand five hundred dollars ($2,500) and subsequent thereto the sum of ten thousand dollars ($10,000) as per the terms of a special con-

tract concerning the fifty thousand dollars ($50,000) which he received from the Golden Cycle Mining Company, supra, pp. 2-3, the payment of which sum was ordered by the resolution of the board of directors on August 27th, 1913 (Transcript pp. 24 and 25).

The evidence introduced on behalf of the plaintiff documentary and oral, supported all of his allegations and the jury brought in a verdict for the full amount asked for by the plaintiff. So the counter-claim with its false and slanderous allegations was by the jury found to be false in fact and untrue.

On page 17 of its brief plaintiff in error states as follows:

> "As has been heretofore stated, plaintiff in error objected to the jurisdiction of the court at the time of the opening statement of counsel for defendant in error and again at the close of his case, and also the opening paragraph of his pleading is an objection to the jurisdiction. But there could be no opening statement and no case on the part of the defendant in error without an answer, and, as heretofore stated, answer was necessary for the want of jurisdiction was not disclosed upon the face of the complaint. Plaintiff in error did all that it could when, as a preamble to pleading its defense or setting up its counter-claim, it did so 'without waiver of its objection that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it or over the subject-matter of this action, which said objections and the several benefits thereof are specifically reserved to it."

If the situation were as plaintiff in error alleges it to be, to wit; that the defendant below objected

to the jurisdiction of the court for the first time at the time of the opening statement of counsel for plaintiff (the complaint stating that the plaintiff was a citizen and resident of California and the defendant a citizen of Maine), there is no question under the decisions that the raising of the jurisdictional question came too late, for the defendant had already filed an answer to the merits and had set up a counter-claim. That this is too late to raise the question of jurisdiction is supported by a multitude of authorities. A few are:

St. Louis & S. F. Co. v. McBride, 141 U. S. 127;

Western Land Co. v. Butte & Boston, 210 U. S. 368;

Lehigh Valley Coal Co. v. Yensavage (C. C. A. 2nd Cir.), 218 Fed. 547-549-550.

The matters arose, however, as in this brief are above set forth.

Therefore it is respectfully submitted that the question of jurisdiction attempted to be raised in this court is of no merit and is merely frivolous and raised for the purpose of delay only.

The only other matter argued in plaintiff in error's brief relates to the introduction of testimony by the witness Edwin L. Oliver, which it designated as assignments of error 6 and 7. Assignment 6 was not supported by an exception and will therefore not be further noticed.

Assignment No. 7 (based on exception No. 5) concerns the following question and answer:

> "Q. What value in your judgment was that confession of judgment to the Moore Filter Company—if the Moore Filter Company had made reasonable use of it in its negotiations with other mining companies that were infringers of its patents?"

To which the witness answered:

> "A. *It is a difficult matter to put in dollars and cents.* It came at a psychological moment. The Moore Filter Company had won its suit against the Tonopah-Belmont in another circuit, and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah-Belmont case was still in the courts, awaiting a judgment,—waiting for the accounting. They had won the case."

That is the whole testimony brought out in answer to the only question in this connection objected to and to which an exception was reserved.

The Court will see that the only pertinent part of the answer is: "It would be a difficult matter to put in dollars and cents."

How could any possible harm be done to the plaintiff in error by that answer?

In Central Vermont Ry. Co. v. Cauble (C. C. A. 2nd Cir.), 228 Fed. 876, 879, in answer to an objection of similar merit the Court said:

> "We do not find it necessary to pass upon the other exceptions taken to rulings of the court below upon minor questions. If some

> of the rulings were erroneous, they were of so trivial a nature as to render the errors, if any there were, negligible. For example, no damages to eyesight was claimed in the complaint, nevertheless plaintiff was asked on direct examination if 'anything was the matter with her eyes after the accident.' This was excepted to; but, as the answer was, 'I don't know', no possible harm was done, and the exception is simply academic."

Moreover, in this case Oliver was shown to be a man peculiarly qualified to testify to the value of that judgment. His qualifications to testify as to the value of that judgment to the Moore Filter Company were gone into at great length (Transcript, pp. 44 and 45), but the only pertinent part of the answer he made to the question excepted to was: "It would be a difficult matter to put in dollars and cents." Defendant in error refrains from discussing this trivial objection further on the ground that the question was perfectly proper if it had brought forth any pertinent testimony, but since in effect the only answer it brought forth was: "It would be a difficult matter to put in dollars and cents", further discussion of the point would seem to be undesirable.

It might be further noticed, however, that Oliver was not asked to testify as to the value of plaintiff's services in any particular, the statements to that effect in plaintiff in error's brief being entirely erroneous and unfounded in fact. In proving that particular item of service included in plaintiff's claim in connection with the Golden Cycle matter

and in order to enlighten the jury as to the kind of services performed by the plaintiff and the value of such services to the client, this testimony was introduced so that the jury might have further light on the matter and so that they could more intelligently fix the value of the services sued for by plaintiff, and Oliver was asked as to his opinion of *the value to the Moore Filter Company* of that judgment which plaintiff had obtained for it, if reasonable use was made of it in its negotiations with other infringers and he answered: "It would be a difficult matter to put in dollars and cents" (the balance of his answer merely explaining why it was a difficult matter to put in dollars and cents), *but Oliver was not asked at any time as to the value of plaintiff's services in procuring such judgment,* nor did Oliver testify to anything of the kind.

It is respectfully submitted that the contentions of plaintiff in error in this matter are entirely without merit and more than that, the plaintiff in error must have known that its contentions herein were entirely without merit and it is submitted that a reasonable conclusion to draw from the case is that the writ of error herein was sued out for the purpose of delay only.

Dated, San Francisco,
November 8, 1916.

Respectfully submitted,

JOHN L. TAUGHER,
Defendant in Error.